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SAW KONG BENG v. MAHKAMAH PERUSAHAAN MALAYSIA & ANOR

HIGH COURT MALAYA, PULAU PINANG
COLLIN LAWRENCE SEQUERAH JC
[JUDICIAL REVIEW NO: 25-58-08-2015]
22 JULY 2016

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ADMINISTRATIVE LAW: *Remedies – Certiorari – Judicial review – Application for – Termination of employee's services – Retrenchment exercise – Whether bona fide – Factors considered – Whether there was redundancy due to surplus of labour – Whether employee's job functions still in existence in company – Employee a long serving employee – Last In First Out ('LIFO') principle – Whether followed – Whether termination tainted with mala fide – Whether termination of employee according to fair labour practice – Whether findings of fact immune from judicial review*

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LABOUR LAW: *Employment – Termination of services – Retrenchment exercise – Whether carried out bona fide – Factors considered – Whether there was redundancy due to surplus of labour – Whether employee's job functions still in existence in company – Employee a long serving employee – LIFO principle – Whether followed – Whether termination tainted with mala fide – Whether termination of employee according to fair labour practice – Whether findings of fact immune from judicial review*

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This was the applicant's application for judicial review to review the award ('the award') handed down by the first respondent which held that the second respondent had dismissed the applicant with just cause and excuse. On 7 July 1980, the applicant commenced employment with Hewlett Packard Malaysia Sdn Bhd ('HP') as a production engineer. Subsequently in 1999, the applicant joined Agilent Technologies Malaysia ('Agilent') and in 2005, Kohlberg Kravis Roberts & Co LP and Silver Lake Partners LLC had acquired the Semiconductor Products Group from Agilent and formed the second respondent. The second respondent continued the applicant's employment in Agilent as manufacturing executive in the second respondent. In November 2007, the applicant was holding the position of Vice President World Wide ('VP WW') Materials/Procurement, Warehousing and Logistics of the second respondent wherein the applicant had five teams directly reporting to him. In January 2009, the applicant reported to one Ooi Boon Chye ('BC Ooi') the Senior Vice President of Global Operations of the second respondent. On 19 February 2009, the second respondent employed a new employee by the name of Ong Ee Chang ('EC Ong') as the Vice President of World Wide Procurement & Outsourcing. On the same day, the second respondent relocated three of the applicant's direct reports to EC Ong leaving the applicant with only two direct reports. When the applicant confronted BC Ooi about the restructuring, he assured the applicant that there was nothing to be concerned about as the second respondent had various

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special projects for the applicant. When the applicant raised his concern that his name as the Vice President of WW Logistics and Special Projects was omitted from the second respondent's facts sheet and leadership team organisation chart, BC Ooi indicated that it was just a mistake and reinstated the applicant's name. However, on 8 May 2009, the second respondent served the applicant with a notice of termination and informed the applicant that he had been retrenched by the second respondent on the ground of redundancy. The applicant submitted, *inter alia*, that (a) the applicant's job functions were still in existence in the company but were mainly taken over by EC Ong about three months before the termination of the applicant; (b) the second respondent's decision to retrench the applicant based on one quarter drop of revenue which was only temporary was grossly unfair to the applicant; (c) there was no evidence to show that the applicant's services were surplus; (d) the second respondent had not adduced any evidence to show that EC Ong could perform better than the applicant and had contravened the "Last In First Out" ('LIFO') principle; (e) the manner in which the applicant was terminated was contrary to all fair labour practice. The issues that arose were (i) whether there was a redundancy; (ii) whether the selection process for the redundancy was properly carried out; and (iii) whether the procedure adopted in the termination of the applicant according to fair labour practice.

Held (allowing applicant's application with costs):

(1) Although it is the management's power and prerogative to retrench, the exercise of that right must be exercised *bona fide*. It is equally clear that the burden is cast upon the employer to prove this. It is trite that retrenchment arises from a redundancy due to surplus of labour. Undoubtedly, one of the criteria to be considered in this exercise is the profitability of the company. Herein, the fact that the decrease in revenue was only confined to the second quarter of 2009 and therefore temporary in nature, was not considered. The second respondent's revenue in the fourth quarter of 2009 had increased to more than USD428 million. Therefore, the second respondent's decision to retrench the applicant based only upon the drop of revenue in one quarter of the year was unfounded. (paras 52, 53 & 55)

(2) It was incumbent upon the second respondent to prove that there was a real redundancy on the facts. It was not in dispute that after the applicant was terminated, all the applicant's job functions were still in existence and in fact given to EC Ong, the newly employed Vice President, and to the applicant's subordinates, in which 60% to 70% of the job functions were carried out by EC Ong, and the remainder of the job functions were absorbed by BC Ooi and the applicant's subordinates. The second respondent had further engineered a "surplus" position for the applicant by removing, three months before the termination, three reporting teams under the applicant and redirected it to EC Ong. During

A that time, there were two occasions when the applicant's name was omitted in the second respondent's organisation documents. The second respondent was ready to issue the notice of termination to the applicant a mere eight days after the second quarter account ended and only three days after the second respondent purportedly reinstated the applicant's
B name into the organisation chart. These chain of events concluded that the company had decided to terminate the claimant long before the second quarter account ended. There was *mala fide* on the part of the second respondent in terminating the applicant on the purported grounds of redundancy. (paras 58, 63, 69, 70 & 71)

C **(3)** The award of the first respondent did not give proper weight to the evidence presented. There was no evidence adduced to show that by terminating the applicant, the second respondent could achieve better efficiency in its management. The second respondent had also alluded to the fact that the claimant's (applicant) charge of *mala fides* was refuted
D through the documentary evidence without referring to what these documents were. There was sufficient evidence for the first respondent to find that the practice of the company in terminating the applicant was tainted with *mala fides*. Therefore, this case was within the category of cases where the findings of fact made by the first respondent were not
E immune from judicial review. (paras 73-75)

(4) The applicant was a long serving employee of some 30 years as compared to EC Ong who had, by comparison, only joined the company for three months. There was no evidence to show that the said EC Ong could have performed better than the applicant. At the material time,
F three out of four reporting teams under EC Ong had previously reported to the applicant. The applicant had much longer experience in handling these reporting teams than EC Ong. Therefore, if at all an employee had to be terminated due to the retrenchment, it should have been EC Ong and not the applicant. The first respondent therefore ought to have
G considered that LIFO was not followed as it should have. (paras 77 & 78)

(5) On 12 May 2009, BC Ooi had arranged a surprise one to one meeting with the applicant which lasted less than ten minutes. At the end of the meeting, the applicant was asked to sign some documents including the
H notice of termination. He signed under protest and was asked to pack and leave that very day. Considering that the applicant had given 30 years of his service to the second respondent, there should at the very least have been some form of consultation with the applicant. This was a situation that was not conducive to industrial harmony. (paras 80 & 81)

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Case(s) referred to:

AmBank (M) Bhd v. Menteri Sumber Manusia & Anor and Another Appeal [2014] 1 LNS 686 CA ***(refd)***

Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 CA ***(refd)***

Council of Civil Service Unions and Others v. Minister for the Civil Service [1985] AC 374 ***(refd)***

Credit Corporation (M) Bhd v. Choo Kam Sing & Anor [1999] 8 CLJ 86 HC ***(refd)***

Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors [2012] 9 CLJ 21 FC ***(refd)***

Malaysian Oxygen Bhd v. Soh Tong Wah & Another Appeal [2015] 1 CLJ 191 CA ***(refd)***

Mamut Copper Mining Sdn Bhd v. Chau Fook Kong @ Leonard & Ors [1997] 2 ILR 625 ***(dist)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd [2010] 8 CLJ 629 FC ***(refd)***

Sheila Sangar v. Proton Edar Sdn Bhd & Anor [2009] 8 CLJ 200 HC ***(refd)***

William Jack & Co (M) Sdn Bhd v. S Balasingam [1997] 3 CLJ 235 CA ***(refd)***

For the appellant - Yong Hon Cheong; M/s Zaid Ibrahim & Co

For the respondents - Gan Khong Aik & Chen Chiu Hua; M/s Gan Partnership

Reported by Suhainah Wahiduddin

JUDGMENT

Collin Lawrence Sequerah JC:

Introduction

[1] This is the applicant's application for judicial review to review the award dated 21 May 2015 ("the award') handed down by the first respondent which held that the second respondent had dismissed the applicant with just cause and excuse.

[2] By way of this application, the applicant seeks *inter alia* the following orders:

(a) an order of *certiorari* to quash the award of the first respondent dated 21 May 2015 which dismissed the applicant's claim for unjust dismissal under Case No. 18(10)(18)-4-692-12;

(b) a declaration that the applicant was dismissed without just cause or excuse and the applicant be reinstated to his former position in the second respondent without loss of seniority with full benefits and privileges or compensation *in lieu* of reinstatement;

(c) in the alternative to (b) above, an order of *mandamus* to remit the applicant's claim under Case No. 18(10)(18)-4-692-12 to the Industrial Court to be heard *de novo* by a different Chairman.

A **Grounds For Judicial Review**

[3] It has now been commonly accepted that the grounds for judicial review in summary are as follows:

(i) illegality – that the decision maker had failed to keep strictly within the
B perimeters of his powers;

(ii) irrationality or "*Wednesbury* unreasonableness" – that the decision was "so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"; and

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(iii) procedural impropriety – that the decision maker failed to observe basic rules of natural justice and or procedural rules.

[4] See *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1985] AC 374 and *AmBank (M) Berhad v. Menteri Sumber Manusia &*
D *Anor and Another Appeal* [2014] 1 LNS 686.

[5] Over the course of time the principle of proportionality has also been added to the above categories thus widening the scope of judicial intervention of administrative action by way of judicial review.

E **[6]** In *Sheila Sangar v. Proton Edar Sdn Bhd & Anor* [2009] 8 CLJ 200; [2009] 4 MLJ 285, the principles governing judicial review was neatly encapsulated as follows:

> The first principle of judicial review concerned the decision making process and not the merits, substance or justification. The second principle is that there can be an exception to the first principle where the court could
F examine the substance or justification to satisfy itself that the decision maker had not transgressed the principles of procedural impropriety, illegality or irrationality.

[7] The boundaries however, that traditionally distinguished review for process and that of substance have been removed. The courts are now
G therefore more inclined to review for substance as well in an appropriate case where the situation so requires. See *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145; [1997] 1 AMR 433, and *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* [2010] 8 CLJ 629; [2010] 6 MLJ 1.

H **Salient Facts**

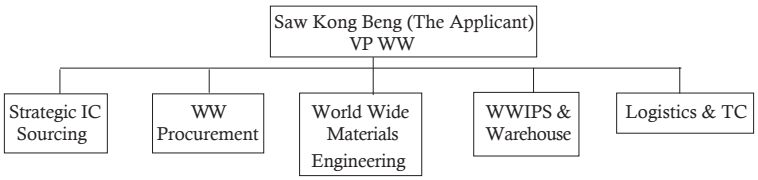
[8] On 7 July 1980, the applicant commenced employment with Hewlett Packard Malaysia Sdn Bhd ("HP") as the production engineer and worked his way up to the position of General Manager.

I **[9]** Subsequently in 1999, the applicant joined Agilent Technologies Malaysia (hereinafter referred to as "Agilent"). Agilent was the predecessor of the second respondent.

[10] In 2005, Kohlberg Kravis Roberts & Co LP and Silver Lake Partners LLC had acquired the Semiconductor Products Group from Agilent and formed the second respondent.

[11] *Vide* a letter dated 1 September 2005, the second respondent continued the applicant's employment in Agilent as manufacturing executive in the second respondent.

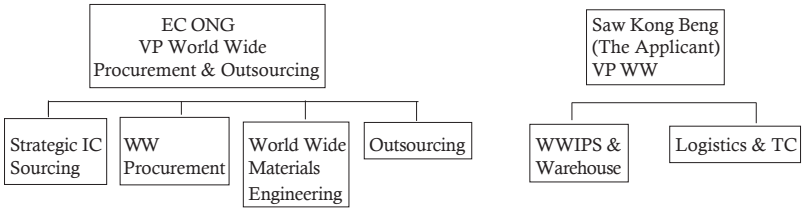
[12] In November 2007, the applicant was holding the position of Vice President World Wide (hereinafter referred to as "VP WW") Materials/ Procurement, Warehousing and Logistics of the second respondent wherein the applicant had five teams directly reporting to him as follows:



[13] In January 2009, the applicant's reporting superior, Dato' Tan Bian Ee (the then Chief Operating Officer ("COO") of the second respondent) resigned as COO. Since then, the applicant reported to one Mr Ooi Boon Chye ("BC Ooi"), the Senior Vice President of Global Operations of the second respondent.

[14] On 19 February 2009, the second respondent employed a new employee by the name of Ong Ee Chang (EC Ong) as the Vice-President of World Wide Procurement & Outsourcing with effect from 19 February 2009.

[15] On the same day, the second respondent relocated three of the applicant's direct reports (Strategic IC Sourcing, WW Procurement, World Wide Materials Engineering) to EC Ong. The applicant was only left with two direct reports, ie, WWIPS & Warehouse and Logistic & TC as diagrammatically illustrated below:



[16] When the applicant confronted BC Ooi about the restructuring, he assured the applicant that there was nothing to be concerned about as the second respondent had various special projects for the applicant.

[17] On 13 April 2009, the applicant found out that his name as the Vice President of WW Logistics and Special Projects was omitted in the second respondent's facts sheet.

[18] On 27 April 2009, the applicant again found out that his name was once again omitted from the second respondent's leadership team organisation chart that was published for internal communication.

[19] When the applicant raised his concern, BC Ooi indicated to the applicant that it was just a mistake. On 5 May 2009, the second respondent reinstated the applicant's name into the organisation chart.

[20] The second respondent served the applicant with a notice of termination dated 8 May 2009 and informed the applicant that he had been retrenched by the second respondent on the ground of redundancy.

[21] At the time he was terminated, the applicant had served the second respondent and its predecessors for almost 30 years.

Summary Of Parties Submissions

Applicant

[22] Learned counsel for the applicant submitted that when the applicant was terminated, all the applicant's job functions were still in existence and in fact given to EC Ong (the newly employed Vice President) and to the applicant's subordinates, in which:

(a) 60%-70% of the job functions were carried out by the EC Ong who was newly employed in February 2009; and

(b) the remainder of the job functions were absorbed by BC Ooi and the applicant's subordinates

[23] This showed that the applicant's job functions were still in existence in the company but were mainly taken over by EC Ong who had joined the second respondent in February 2009, about three months before the termination of the applicant.

[24] The applicant also submitted that he was terminated based on only one quarter drop of revenue in the second quarter of 2009. The first respondent had omitted the evidence led by the applicant which proved that the second respondent was consistently profitable (except for second quarter of 2009) during that material year and hence there was no need to reorganise and get rid of his job functions.

[25] The first respondent had neglected the fact that the drop of revenue in second quarter was only temporarily. The second respondent's revenue in fourth quarter of 2009 had hiked up to more than USD428 million. The second respondent's decision to retrench the applicant (who was already in service for 30 years) based on one quarter drop of revenue which was only temporary was grossly unfair to the applicant.

[26] There was thus no evidence to show that the applicant's services were surplus, and there was also no evidence to show that the retrenchment of the applicant could meet the purpose of avoiding the second respondent in incurring losses.

[27] The second respondent had chosen to terminate the applicant who was in service for almost 30 years with the second respondent and its predecessors and instead retained the said EC Ong who had joined the company for only three months and was performing the same job functions that could be performed by the applicant.

[28] The applicant further contended that the second respondent had not adduced any evidence to show that EC Ong could perform better than the applicant and have thus contravened the "Last In First Out" or ("LIFO") principle. The second respondent had clearly departed from LIFO when there was no evidence to justify such departure.

[29] The applicant also assailed the manner in which he was unceremoniously terminated and contended that it was contrary to all fair labour practice. There were two occasions in April 2009, the applicant actually confronted BC Ooi on the omission of his name in the company's organisation chart. At all material times, the second respondent took no initiative to inform the applicant on the impending retrenchment.

[30] The applicant also submitted that the second respondent misled the applicant into believing that the omission was just a clerical mistake and reinstated the applicant's name into the organisation chart on 5 May 2009. However, unknown to the applicant, the second respondent had prepared a notice of termination dated 8 May 2009 and planned to terminate the applicant on 12 May 2009. The applicant was also told to pack and leave the company in less than two hours.

[31] The applicant submitted that two months before the company retrenched him, the second respondent had on 11 March 2009 unilaterally changed the retrenchment benefits without consulting the applicant.

[32] It was further contended that in February 2009, BC Ooi had selectively taken away the applicant's three reporting teams under the applicant and kept the remaining two reporting teams led by one Chan Peng Loon and Christian Wolf with the applicant and at the same time assured to the applicant that there would be special projects.

[33] At all material times, the second respondent already knew the numbers of the special projects and the competency of Chan Peng Loon and Christian Wolf. The second respondent deliberately kept these two competent subordinates with the applicant in preparation for the second respondent's future justification of delayering the applicant on the ground that these subordinates were competent to work without the applicant.

[34] The second respondent also did not adduce any evidence to prove the competency of Chan Peng Loon and Christian Wolf. Both of them were not called as a witness. Neither did the second respondent produce any evidence to show that the special project was minimal.

[35] The applicant therefore contended that he was terminated under the guise of retrenchment. The first respondent had failed to take into account these relevant facts above while taking irrelevant considerations into account. The first respondent had therefore committed errors of law which justified review.

Respondents

[36] The second respondent submitted that in November 2007, the applicant's functions were transferred to another employee pursuant to a restructuring exercise.

[37] In February 2009, another reorganisation took place at the second respondent and the applicant's functions of procurement/materials were then reallocated and rationalised. The rationalisation took place after taking into account various issues, including the applicant's dismal performance ranking of "3" given by his superior in late 2008.

[38] The applicant was retrenched with effect from 1 June 2009 *vide* a letter dated 8 May 2009 which informed the applicant that due to the continuous restructuring at the second respondent which led to inevitable elimination or reduction of jobs, his job was impacted. The said letter also informed the applicant that he would be paid the restructuring management severance package in line with applicable laws.

[39] The second respondent submitted that after the applicant was retrenched, no one new was brought in to take over the applicant's existing portfolio of Worldwide Warehouse & Logistics. As for the applicant's short stint with the special projects portfolio, which was meant to be short term, any work in respect of this was fully absorbed by the applicant's superior at the material time.

[40] The second respondent went on to submit that the first respondent had duly deliberated on the applicant's allegations and came to a finding of fact that the second respondent had acted in the way that it did in its best commercial interest and therefore in the exercise of its legitimate management prerogative. The first respondent had also come to a finding of fact that the applicant had failed to prove that the reorganisation which led to the applicant's retrenchment was *mala fide*.

[41] The applicant had further accepted that the reorganisation exercise was genuine in February 2009 and it is not now open to him to argue at this stage that the second respondent had orchestrated his removal from the

second respondent by reallocating 60% to 70% of the applicant's responsibilities in February 2009 while not recording his contemporaneous protest in respect of the same.

[42] The second respondent also submitted that that the first respondent had also taken into account the fact that the applicant had signed off on the renewed organisation chart each time without any formal protest of recorded objections.

[43] Although his position had been omitted by the second respondent in April 2009, the applicant's name was included in the revised leadership team organisation chart as at 5 May 2009. Thereafter, this fact ought not to be raised as an issue.

[44] The second respondent submitted that the issue of their non-adherence to the LIFO principle was not raised during the course of proceedings before the first respondent and ought not now to be considered.

Analysis Of Arguments And Findings

[45] A consideration of the submissions advanced by parties converge into the following main issues that need to be determined by this court. They are firstly, whether there was a redundancy, secondly, was the selection process for the redundancy properly carried out, and thirdly, was the procedure adopted in the termination of the applicant according to fair labour practice.

Was There A Redundancy?

[46] The submission of learned counsel for the applicant is that the first respondent had only relied upon "*Soonvala*'s criteria" in determining whether the dismissal of the applicant was with just cause and excuse, namely:

(a) Was the retrenchment justified by the circumstances of the case?

(b) Were grounds for the retrenchment given by the employer true?

(c) Whether the order or retrenchment was motivated by bad faith?

[47] In so doing, the first respondent had thus fallen into an error of law in failing to consider the preliminary issue of whether or not there was a need to reorganise. Learned counsel for the applicant instead referred to "*Industrial Relations In Malaysia: Law & Practice*" by Dr Dunston Ayadurai where it was stated:

> The Industrial Court describes how it goes about determining when reorganization justifies retrenchment in *Gold Coins Feedmills Sdn Bhd v. Ibrahim Shah* (Award 657 of 2001) read with *PBR Automotive Sdn Bhd v. Subramaniam Andi & Ors* (Award 237 of 2002):
>
> 1. The Issues
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> The issues before the court are as follows:
>
> (a) Was there a *bona fide* need to reorganise the employer's business?

A (b) were the employees' service redundant as a result of the reorganisation, thereby justifying their retrenchment? and

(c) was the employees' selection made in accordance with the general principles of retrenchment?.

B **[48]** Therefore, it was argued that a preliminary issue to be determined was whether there was a *bona fide* need to reorganise?

[49] The principles regarding retrenchment are fairly well settled. In *William Jack & Co (M) Sdn Bhd v. S Balasingam* [1997] 3 CLJ 235 at p. 241 it was held:

C Retrenchment means: the discharge of surplus labour or staff by the employer for any reason whatsoever otherwise than as a punishment inflicted by way of disciplinary action (per S.K. Das in *Hariprasad v. Divelkar* AIR [1957] SC 121 at p. 132)

D Whether the retrenchment exercise in a particular case is *bona fide* or otherwise, is a question of fact and of degree depending for its resolution upon the peculiar facts and circumstances of each case. It is well-settled that an employer is entitled to organise his business in the manner he considers best. So long as that managerial power is exercised *bona fide*, the decision is immune from examination even by the Industrial Court. However, the Industrial Court is empowered, and indeed duty-bound, to E investigate the facts and circumstances of a particular case to determine whether that exercise of power was in fact *bona fide*.

[50] In *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155 the Court of Appeal held:

F On redundancy it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (See *Chapman & Others v. Goonvean & Rostawrack China Clay Co Ltd* (1983) 2 All ER 1603). It is our view that merely to show evidence of reorganisation in the appellant is certainly not sufficient. There was evidence before this court that although sales were reduced, the workload of the respondent remained G the same. After his dismissal his workload was taken over by two of his former colleagues. Faced with these evidence, it is any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such extent that he was considered redundant.

H **[51]** In the book "*Retrenchment Law and Procedure in Malaysia*" by Thavalingam Thararajah dan Raymond TC Low, 2009 CCH Asia Pte Limited, the learned authors opined as follows:

I When a retrenchment employee challenges the retrenchment under s. 20 of the IRA, the employer's burden is restricted to proving that the retrenchment was pursuant to a *bona fide* exercise of management prerogative. There is no requirement for the employer to go further to prove that the exercise of that management prerogative was acceptable in

business terms or that the business benefited from it. In determining whether or not the exercise of the management prerogative was *bona fide*, the Industrial Court will examine the reason or reasons put forward by the employer as his grounds for the reorganisation or restructuring that resulted in the retrenchment.

[52] The common thread that runs through the above authorities is that although it is management's power and prerogative to retrench, the exercise of that right must be exercised *bona fide*. It is equally clear that the burden is cast upon the employer to prove this. It is trite that retrenchment arises from a redundancy due to surplus of labour.

[53] Undoubtedly one of the criteria to be considered in this exercise is the profitability of the company. In *Credit Corporation (M) Bhd v. Choo Kam Sing & Anor* [1999] 8 CLJ 86; [1998] MLJU 483, the Industrial Court held that the retrenchment exercise was not carried out *bona fide* as there was evidence in that case that the company was experiencing profit and dividends were paid to shareholders.

[54] During the course of evidence before the first respondent, it emerged that the second respondent experienced a one quarter drop of revenue in the second quarter of 2009. It was on this basis that the applicant services were terminated. It was argued that the first respondent had omitted the evidence led by the applicant which proved that the second respondent was consistently profitable (except for second quarter of 2009) during that material year and hence there was no need to reorganise and get rid of his job functions.

[55] After having perused through the award by the first respondent, I find that the fact that the decrease in revenue was only confined to the second quarter of 2009 and therefore temporary in nature, was not considered. If one were to consider the second respondent's revenue in the fourth quarter of 2009, it will be seen that the revenue had increased to more than USD428 million. I find therefore that the second respondent's decision to retrench the applicant only based upon the drop of revenue in one quarter of the year as unfounded.

[56] Although it was contended by the second respondent that a company need not wait to experience financial losses before taking action to ensure efficacy and effectiveness in its overall operations based upon the decision in *Mamut Copper Mining Sdn Bhd v. Chau Fook Kong @ Leonard & Ors* [1997] 2 ILR 625, I agree with learned counsel for the applicant that *Mamut*'s case can be distinguished as a review was undertaken by the company there and it was found as a result that the company was employing supernumerary staff thus justifying the cost cutting exercise.

[57] On the contrary, no evidence was forthcoming in this case to show that a similar review was carried out to determine that the applicant was surplus and that his retrenchment would achieve the overall objective of the second respondent in cutting its losses.

[58] In discharging its burden, it is incumbent upon the second respondent to prove that there was a real redundancy on the facts. In considering the facts of the case, it is not in dispute that after the applicant was terminated, all the applicant's job functions were still in existence and in fact given to EC Ong, the newly employed Vice President, and to the applicant's subordinates, in which 60%-70% of the job functions were carried out by the EC Ong who was newly employed in February 2009 and the remainder of the job functions were absorbed by BC Ooi and the applicant's subordinates.

[59] In *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 CLJ 155, it was held:

> There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. *After his dismissal his workload was taken over by two of his former colleagues.* Faced with these evidence, *is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's function were reduced to such an extent that he was considered redundant*. (emphasis added)

[60] These principles were also referred to in the case of *Dynacraft Industries Sdn Bhd v. Kamaruddin Kana Mohd Sharif & Ors* [2012] 9 CLJ 21; [2012] 6 MLJ 453, where the Federal Court held that:

> We cannot accept that submission made on behalf of the appellant. As found by the learned High Court judge, the evidence of Chow Heng Khow and Ch'ng Beng Tatt were not challenged by the appellant. Chow Heng Khow's evidence shows that *upon his dismissal, his job was taken over by Ann Lin (COW2)*. In respect of Ch'ng Beng Tatt, *upon his dismissal his job functions were taken over by Bill Fulton assisted by the engineer YF Yap*. Consequently, the Court of Appeal held (and in our view rightly) that with the unchallenged evidence of *Chow Heng Khow and Ch'ng Beng Tatt that their respective jobs and workload were taken over by two other employees, and not eliminated or extinguished, redundancy was not proven, as mere reorganisation was insufficient to justify their retrenchment* which was correctly held to be without just cause or excuse. In this regard in *Bayer (M) Sdn Bhd v. Ng Hong Pau* [1999] 4 MLJ 361; [1999] 4 CLJ 155, Shaik Daud JCA speaking for the Court of Appeal said at p. 364 (MLJ), p. 160 (CLJ):
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> > *… The burden is on the appellant to prove actual redundancy on which the dismissal was grounded* (see *Chapman & Others v. Goonvean & Rostawvack China Clay Co Ltd* [1983] 2 All ER). *It is our view that merely to show evidence of a re-organisation in the appellant is certainly not sufficient*. There was evidence before the court that although sales were reduced, the workload of the respondent remained the same. *After his dismissal his workload was taken over by two of his former colleagues*. Faced with these evidence, is it any wonder that the court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's functions were reduced to such an extent that he was considered redundant. (emphasis added)

[61] On the facts of the case, it clearly emerged that after the termination of the applicant, his job functions were still very much in existence in the company except that it was taken over by EC Ong who had joined the

company some three months before the termination of the applicant. In addition, it was also in evidence that two subordinates of the applicant, namely, Chan Peng Loon and Christian Wolf had absorbed the applicant's remaining functions.

[62] Notwithstanding the terminology used to describe this absorption of functions, whether it was termed as delayering or that the functions were distributed upwards to the applicant's superior or downwards to his subordinates, the undisputed facts were that the job functions that the applicant performed were taken over by other employees of the second respondent after his termination. This of course meant that the applicant's job functions were still in existence.

[63] I tend to agree with the contention of learned counsel for the applicant that the second respondent had further to this, engineered a "surplus" position for the applicant by removing, three months before the termination, three reporting teams under the applicant and redirected it to EC Ong. This was a fact that the first respondent had failed to address and consider.

[64] The second respondent submitted that the fact that the applicant had never raised any protestations to the reorganisation in February 2009 that omitted 60% to 70% of his job function showed that the reorganisation was genuine. In respect of this, looking at the facts as a whole, I agree with the submission of learned counsel for the applicant that the reason for this was that the applicant had reposed his trust in BC Ooi who assured him that the reorganisation was genuine and that the applicant's help was needed on special projects and that he was to continue to manage WW Warehousing and Logistics.

[65] In respect of whether the "special projects" were short or long term, this court can only, as also recognised by the second respondent, decide in accordance with what is stated in the official records of proceedings. I therefore find that there was no evidence on record to suggest that the "special projects" was only expressed to be on a short term basis. In any event, as learned counsel for the applicant pointed out, this fact was never pleaded nor was it suggested during the course of the trial before the first respondent. From a totality of the facts, I find that it was quite evident that the applicant was misled by what was told to him by BC Ooi and hence the reason for him not lodging any protest on this. This aspect of the applicant's case was not considered by the first respondent.

[66] In respect of the applicant signing off on the organisation chart in 2007, I agree with the submission by learned counsel for the applicant that the applicant had agreed and signed off under the circumstances that he had in fact acquired more responsibilities. The first respondent had in this respect also erroneously stated that both the "outsourcing and manufacturing" functions were transferred out from the applicant when in fact it was only the "outsourcing" function that was transferred out to another employee.

A However, it must be also noted that this reallocation of duties took place in 2007 and its impact therefore minimal when considering the more recent events that took place which resulted in the retrenchment of the applicant.

[67] In respect of the issue of *mala fide*, it is necessary to allude, at the risk of repetition, to the brief chronology of events prepared by counsel for the B applicant, preceding the termination in order to appreciate its effect.

Date	Incident
19.2.2009	The second respondent took away 60%-70% of the applicant's job functions and reassigned them to EC Ong. At the same time, BC Ooi assured the applicant that there were special projects for the applicant.
11.3.2009	The second respondent reduced the retrenchment benefits to be paid to employees by limiting it to maximum nine months of compensation
13.4.2009	The applicant's name was omitted from the second respondent's fact sheet
27.4.2009	The applicant's name was again omitted from the leadership team organisation chart
8 days later	
5.5.2009	The second respondent reinstated the applicant's name into the organisation chart after the applicant confronted BC Ooi on the omission of his name in the organisation chart
3 days later	
8.5.2009	Unknown to the applicant, the second respondent prepared the notice of termination dated 8 May 2009 despite the fact that the second respondent had just reinstated the applicant's name into the organisation chart
4 days later	
12.5.2009	The second respondent arranged a surprise meeting with the applicant and the applicant was terminated on the ground of redundancy. At that time, the claimant was the only Vice President being retrenched during the entire retrenchment exercise.
26.6.2009	Avago Technologies Limited (the parent company of the respondent) exercised its call option and repurchased the applicant's shares at USD6.76 per share.
August 2009	The shares of Avago Technologies Limited was offered for sale to public at USD15 per share in its initial public offering (IPO) at NASDAQ Stock Market.

[68] Looked upon in isolation, these events may seem innocuous as comprising part and parcel of the second respondent's ordinary exercise of its management prerogative. However, when considered as a whole and taken in its totality, certain features of the actions taken by the second respondent give the distinct impression that there was more to this.

[69] Certain of these events stand out, in particular, the following:

(a) the time frame from the day that the second respondent took away the 60%-70% of the applicant's job functions up to the day he was said to be redundant, was barely three months. During that time, there were two occasions when the applicant's name was omitted in the second respondent's organisation documents and the second respondent's only explanation was such omission was a genuine mistake.

(b) at the same time, BC Ooi assured the applicant that there were various special projects in which needed the applicant's help. Before the first respondent, BC Ooi said that those special projects were minimal.

(c) the second respondent reinstated the applicant's name into the organisation chart on 5 May 2009 but a mere three days later, the notice of termination dated 8 May 2009 was prepared.

(d) BC Ooi in evidence before the first respondent said that the second respondent decided to reorganise in view of the decline in revenue in the second quarter of 2009. Based on the second respondent's account, the second quarter of the respondent only ended on 31 April 2009 and the report only generated on 3 May 2009 and the applicant's name reinstated into the organisation chart on 5 May 2009. The second respondent however was ready to issue the notice of termination to the applicant as early as 8 May 2009, ie, a mere eight days after the second quarter account ended and only three days after the second respondent purportedly reinstated the applicant's name into the organisation chart.

[70] These events show that it was improbable that the second respondent could have determined and executed the reorganisation in merely three days. These chain of events lead me to conclude that the company had decided to terminate the claimant long before the second quarter account ended.

[71] It also leads to the reasonable conclusion that the purported reason of decline in revenue was an afterthought. From a combination of the facts and circumstances as alluded to above, taken in totality, the first respondent ought to have found that there was *mala fide* on the part of the second respondent in terminating the applicant on the purported grounds of redundancy.

[72] In the case of *Malaysian Oxygen Bhd v. Soh Tong Wah & Another Appeal* [2015] 1 CLJ 191, the Court of Appeal laid out the principles that govern a court when seeking to review findings of fact of a tribunal in a judicial review and the extent to which this can be done as follows:

Scrutiny for substance involves examination of findings of fact. The extent to which the court can review findings of fact of a tribunal has the same practical limitations as in an appeal from a trial court:

(a) A primary finding (eg, unfair dismissal) at the end of a case is drawn from other secondary facts (eg, the various acts of unfairness) which if disputed it itself the subject of a finding of fact drawn from admissible evidence (eg, documents, witnesses etc.) produced and admitted into evidence before the tribunal.

(b) The High Court in judicial review is in no position to re-assess a finding of fact that is an assessment of credibility, including relative credibility of witnesses seen and heard giving testimony and tested on that testimony before the tribunal. See *Ranjit Kaur S Gopal Singh v. Hotel Excelsior (M) Sdn Bhd* (*supra*).

(c) But unless the reasoning in the award demonstrates that the finding is made upon an assessment of credibility, with the reasoning not only asserting it was so made but also setting out the observations, for example the conduct of the witness in the way he behaves, answers questions or a particular question in examination-in-chief or in cross-examination, then the High Court can treat that testimony as any other evidence and give it the weight it deserves.

[73] I find that the award of the first respondent did not give proper weight to the evidence presented when deciding as it did. For instance, the first respondent had said, "There was naught to show any spuriousness in the company's stance with regard to the various challenges that it faced to create better efficiencies in its operations and organisation; or with regard to its relatively diminishing financial position at the material time."

[74] With respect to the learned Chairman, there was no evidence adduced to show that by terminating the applicant, the second respondent could achieve better efficiency in its management. The second respondent had also alluded to the fact that the claimant's (applicant) charge of *mala fides* was refuted through the documentary evidence without referring to what these documents were. As stated above, I also find that upon a consideration of all the evidence, there was sufficient evidence for the first respondent to find that the practice of the company in terminating the applicant was tainted with *mala fides*.

[75] This therefore brought this case within the category of those cases where the findings of fact made by the first respondent were not immune from judicial review.

Was The Selection Process For The Redundancy Properly Carried Out?

[76] The "Last In First Out" (LIFO) rule is contained in the Code of Conduct for Industrial Harmony. Although contained in a code, the adherence to the principles of LIFO is normally observed unless there are valid reasons to countenance its departure. See the case of *Syarikat Eastern Smelting Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Perusahaan Lagon Se-Malaya* (Award No. 16 of 1968), it was held that:

> It is well-established and accepted in industrial law that in effecting retrenchment, an employer should comply with the industrial principle of last come first go, unless there are some valid reasons for departure.

[77] It must not be lost sight of the fact that the applicant was a long serving employee of some 30 years as compared to EC Ong who had by comparison only joined the company for three months. One of the reasons that allow a departure from LIFO is that a junior employee can perform the same job function with greater efficiency than an employee of much longer service.

[78] There was however no evidence to show that the said EC Ong could have performed better than the applicant. At the material time, three out of four reporting teams under EC Ong had previously reported to the applicant. However, the applicant had much longer experience in handling these reporting teams than EC Ong. Therefore, if at all an employee had to be terminated due to the retrenchment, it should have been EC Ong and not the applicant. The first respondent therefore ought to have considered that LIFO was not followed as it should have.

[79] As far as the contention that LIFO was never pleaded, even though the exact expression was not used, the applicant's case was that the second respondent had employed the said EC Ong to replace the applicant and that although EC Ong was just three months in employment as compared to the 30 years served by the applicant, the second respondent had chosen to instead retain the services of the said EC Ong. I therefore find that on the facts as evident from the applicant's stand, it was clear that LIFO was a live issue in this case. See also *R Rama Chandran v. Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147.

Was The Procedure Adopted In The Termination Of The Applicant According To Fair Labour Practice?

[80] On 12 May 2009, BC Ooi arranged a surprise one to one meeting with the applicant. This meeting lasted less than ten minutes. At the end of the meeting, the applicant was asked to sign some documents including the notice of termination dated 8 May 2009. He signed under protest and was asked to pack and leave before 4.40pm that very day.

[81] Considering that the applicant had given 30 years of his service to the second respondent, there should at the very least have been some form of consultation with the applicant. This was a situation that was not conducive to industrial harmony.

[82] In the circumstances, I allow the applicant's application with costs. I remit the case back to the Industrial Court for assessment of compensation and back wages and other benefits and emoluments, if any.